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**UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

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CAPANA SWISS ADVISORS AG, a Swiss  
corporation; AMERIMARK  
AUTOMOTIVE AG, a Swiss corporation,

Plaintiffs,

v.

RYMARK, INC., a Utah corporation;  
NICHOLAS THAYNE MARKOSIAN, an  
individual; JOHN KIRKLAND, an individual;  
and VICKY SMALL, an individual,

Defendants.

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' SHORT FORM  
MOTION TO ACCOMMODATE  
THIRD-PARTY SCHEDULES AND  
AUTHORIZE THREE THIRD-PARTY  
DEPOSITIONS—JOHN SIMKISS,  
SARAH SIMKISS, AND H2E—AFTER  
SCHEDULED CLOSE OF DISCOVERY**

Case No. 2:23-cv-00467

Judge: Hon. Ted Stewart

Magistrate Judge: Hon. Cecilia M. Romero

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Defendants call *Plaintiffs* unreasonable, but it was *Defendants* who waited *six months* to notice the depositions of third-parties with no involvement in this case, John and Sarah Simkiss and H2E (“Simkiss/H2E”). Defendants want to use these depositions to extend discovery. There is no basis to do so. Defendants’ overlength Motion<sup>1</sup> purports to “accommodate third-party schedules.” Not so. Defendants’ Motion should be denied because: (1) Defendants unduly delayed any effort to depose Simkiss/H2E; and (2) Simkiss/H2E are completely unrelated parties.

***First***, Defendants waited *six months* to try and depose Simkiss/H2E after the parties first discussed Simkiss during the June 18, 2024 meet-and-confer.<sup>2</sup> On July 15, 2024, Plaintiffs produced a document where Simkiss was copied (PL\_0000016404). Defendants then asked Mr. Bernhardt extensive questions about Simkiss/H2E at his September 4, 2024 deposition. Defendants then ***waited until December 9, 2024*** to serve subpoena notices to Simkiss/H2E (including grossly overbroad document requests like “all communications between [Simkiss] and” *fifteen* individuals/entities). On January 8, 2025, Defendants asked Plaintiffs to extend discovery until after Simkiss/H2E depositions. Plaintiffs explained to Defendants that Simkiss/H2E have no relevance to this case, and therefore, there was no basis to extend discovery for their depositions.

Motions of this nature are routinely denied. *See, e.g., Cooperstein v. Univ. of Utah*, 2:22-cv-00537, 2025 U.S. Dist. LEXIS 8988, at \*1 (D. Utah Jan. 16, 2025) (denying extension where the need for depositions was “foreseeable before the close of fact discovery” and the moving party was not “diligen[t] in pursuing them”); *Newpath Mut. Ins. Co. v. Higgins*, No. 2:22-cv-00709; 2024 U.S. Dist. LEXIS 183176 at \*1-2 (D. Utah. Oct. 7, 2024). Defendants’ reliance on *Borandi v. USAA Cas. Ins. Co.* to claim otherwise is misplaced. *Borandi* prohibits unilaterally noticed depositions, which is exactly what Defendants did here. No. 2:13-cv-141-TS-PMW, 2014 U.S. Dist. LEXIS 199987, at \*6 (D. Utah Feb. 3, 2014). *Borandi* encourages “agreeing to

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<sup>1</sup> Defendants’ 689-word Motion violates DUCivR 37-1(a)(3).

<sup>2</sup> The “hearing” Defendants reference in their Motion was held on *June 13, 2024*.

short extensions of time ... particularly where there is no resulting prejudice.” *Id.* at \*2. Here, in contrast, Defendants did not provide alternative dates. Moreover, given that Plaintiffs have complied with all discovery deadlines, Plaintiffs will be prejudiced by further delay. *See* ECF No. 228.

**Second**, Defendants do not and cannot show that Simkiss/H2E have *any* relevant information in this case.<sup>3</sup> Defendants even acknowledge the attenuated relationship with Simkiss/H2E – stating that Simkiss/H2E *considered* investing in Philomaxcap, the *parent of the parent of the parent* of AmeriMark Automotive. There is no basis to extend discovery for these depositions. The Motion should be denied.

Dated: February 3, 2025

PARSONS BEHLE & LATIMER

/s/ Erik A. Christiansen

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and AmeriMark Group AG*

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<sup>3</sup> Simkiss/H2E filed motions to quash the subpoenas, noting that Defendants “inaccurately represented that [Simkiss/H2E] had ‘long been involved in this litigation.’” *Capana Swiss Advisors, AG, et al. v. Rymark Inc., et al.*, Case No. 2:25-mc-00005-AB (E.D. Pa.), Dkt. No. 1; *see also Capana Swiss Advisors, AG, et al. v. Rymark Inc., et al.*, Case No. 2:25-mc-00153-SSV-DPC (E. D. La), Dkt. No. 1.

**CERTIFICATE OF SERVICE**

I hereby certify that on **February 3, 2025**, I caused a true and correct copy of the foregoing **OPPOSITION TO DEFENDANTS’ SHORT FORM MOTION TO ACCOMMODATE THIRD-PARTY SCHEDULES AND AUTHORIZE THREE THIRD-PARTY DEPOSITIONS—JOHN SIMKISS, SARAH SIMKISS, AND H2E—AFTER SCHEDULED CLOSE OF DISCOVERY** to be filed on CM/ECF and accordingly electronically served to the parties of record.

*/s/ Hannah Ector*

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Hannah Ector